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Comptroller General  
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## Decision

**Matter of:** C2C Solutions, Inc.; TrustSolutions, LLC

**File:** B-401106.6; B-401106.7

**Date:** June 21, 2010

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Thomas K. David, Esq., David, Brody & Dondershine, LLP, for C2C Solutions, Inc., and Barbara A. Duncombe, Esq., Taft Stettinius & Hollister, LLP, for TrustSolutions, LLC, the protesters.

David S. Cohen, Esq., Cohen Mohr LLP, for the intervenor.

Jamie B. Insley, Esq., and Michael Laurence, Esq., Centers for Medicare and Medicaid Services, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Agency's proposed corrective action, in response to GAO recommendation in prior decision sustaining protest, to provide awardee with an additional opportunity to address concerns regarding its organizational conflict of interest mitigation plan, is not precluded by Federal Acquisition Regulation § 9.504(e) and does not constitute unequal discussions with only one offeror.

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### DECISION

C2C Solutions, Inc., of Jacksonville, Florida, and TrustSolutions, LLC, of Milwaukee, Wisconsin, protest the corrective action being taken by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), in response to our recommendation for corrective action in C2C Solutions, Inc., B-401106.5, Jan. 25, 2010, 2010 CPD ¶ 38. In that decision we sustained C2C's protest against award of a contract to AdvanceMed Corp., of Rockville, Maryland, under request for proposals (RFP) No. RFP-CMS-2008-0014, issued by CMS for contracts in support of its audit, oversight, and anti-fraud, waste, and abuse efforts in two geographic zones (Zone 1 and Zone 2). C2C and TrustSolutions both argue that CMS's corrective action is flawed because it does not implement the recommendation set forth in our decision and is inconsistent with Federal Acquisition Regulation (FAR) § 9.504(e). The protesters also challenge the corrective action on the ground that CMS has not fully implemented our recommendation within 60 days of our decision on the prior protest.

We deny the protests.

## BACKGROUND

In sustaining C2C's prior protest, we concluded that CMS failed to reasonably consider the plan submitted on behalf of the awardee, AdvanceMed, by its parent company, Computer Sciences Corporation (CSC), to mitigate AdvanceMed's identified organizational conflicts of interest (OCI). In this regard we found that the plan "lack[ed] the necessary level of detail to reasonably assess the viability of AdvanceMed's mitigation approach." C2C Solutions, Inc., *supra*, at 6-7. While the plan identified three possible approaches to mitigate the conflicts (specifically, divestiture of AdvanceMed by CSC, terminating contracts which created the conflicts, or subcontracting the conflicted work), the plan did not contain any details explaining how any of the proposed solutions would work or when they would, or could, in fact be implemented. This lack of detail was significant, in our view, given the complex nature of the proposed strategies. We therefore recommended that "the agency reconsider its determination that AdvanceMed is eligible for award based on the amended OCI mitigation plan submitted on behalf of AdvanceMed by its parent company, CSC." *Id.* at 9.

In a letter dated March 25, 2010, CMS advised our Office that it plans to implement our recommendation by "re-engaging" AdvanceMed regarding its proposed OCI mitigation strategy. According to CMS, this would afford AdvanceMed "a reasonable opportunity to respond to the concerns" identified in our decision regarding AdvanceMed's mitigation plan, consistent with FAR § 9.504(e).<sup>1</sup> If AdvanceMed's response proves unsatisfactory, CMS states that it will assess further action at that time.

## DISCUSSION

C2C and TrustSolutions argue that CMS's decision to reengage AdvanceMed regarding its proposed OCI mitigation plan, and thereby allow AdvanceMed an opportunity to revise the plan, is improper because it is inconsistent with our recommendation in C2C Solutions, Inc., *supra*; it is contrary to FAR § 9.504(e), which, according to the protesters, allows an agency to provide only an "apparent

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<sup>1</sup> In relevant part, FAR § 9.504(e) provides as follows:

The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the contracting officer shall notify the contractor, provide the reasons therefore, and allow the contractor a reasonable opportunity to respond.

awardee” with “a” (meaning one) reasonable opportunity to respond to an agency’s OCI concerns; and because allowing AdvanceMed a further opportunity to address its mitigation plan constitutes unequal discussions with only AdvanceMed.<sup>2</sup> Both firms also challenge CMS’s corrective action on the ground that CMS has failed to “fully implement” our recommendation within 60 days, as contemplated by 31 U.S.C. § 3554(b)(3).<sup>3</sup>

As a general matter, the details of implementing our recommendations for corrective action are within the sound discretion and judgment of the contracting agency. See, e.g., Partnership for Response and Recovery, B-298443.4, Dec. 18, 2006, 2007 CPD ¶ 3 at 3; NavCom Defense Elec., Inc., B-276163.3, Oct. 31, 1997, 97-2 CPD ¶ 126 at 2. In this regard, where an agency’s corrective action extends beyond that which may be specifically called for in our recommendation, the agency’s decision to pursue such a course of action does not, by itself, provide a basis for protest absent some showing that the agency’s proposed corrective action is contrary to procurement law or regulation, or is otherwise improper. See, e.g., NavCom Defense Elec., Inc., supra, at 3 (agency reasonably decided to open discussions with offerors and obtain revised proposals without amending RFP notwithstanding the fact that we recommended reopening discussions only if RFP needed to be amended).

Given CMS’s inherent discretion to craft and implement what it reasonably believes to be appropriate corrective action, the extent to which CMS’s proposed corrective

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<sup>2</sup> CMS and AdvanceMed argue that TrustSolutions is not an interested party to challenge the agency’s corrective action because it was not a party to the protest which prompted the agency’s corrective action. We disagree. TrustSolutions is not seeking to revive protest issues previously decided by our Office. Rather, TrustSolutions’ protest, which concerns the propriety of the agency’s decision to reengage AdvanceMed, and only AdvanceMed, regarding its OCI mitigation strategy, is in the nature of a challenge to the ground rules of the competition. See Northrop Grumman Info. Tech., Inc., B-400134, Aug. 18, 2009, 2009 CPD ¶ 167 (noting that protest challenging agency’s announced decision not to hold discussions or permit further clarifications as part of its corrective action is a protest concerning the ground rules for the competition and therefore analogous to a challenge to the terms of a solicitation). Because TrustSolutions’ protest in essence relates to the ground rules of the competition for which it remains a competitor, it is an interested party to maintain the protest.

<sup>3</sup> C2C also argues that AdvanceMed’s proposal is unacceptable based on its failure to disclose another OCI stemming from a relationship its corporate parent, CSC, has formed with a particular hospital. Protest at 4. To the extent such argument is even timely raised at this juncture, it is premature given that the agency is still in the process of implementing its corrective action and the award to AdvanceMed remains in question.

action may be characterized as broader than, or inconsistent with, our recommendation is not the relevant inquiry.<sup>4</sup> Rather, the pertinent question is whether the corrective action proposed by CMS is, as the protesters have alleged, contrary to FAR § 9.504(e) or constitutes improper discussions. We conclude that the protester's arguments are without merit on both counts.

Under FAR § 9.504(e), when an agency concludes that an apparently successful offeror is ineligible for award based on a conflict of interest, the agency is required to notify the firm and allow it "a reasonable opportunity to respond" to the agency's concerns. Here, the protesters argue that it is inconsistent with FAR § 9.504(e) for CMS to give AdvanceMed an additional opportunity to address the agency's concerns regarding its OCI mitigation plan. The protesters maintain that FAR § 9.504(e) only contemplates affording AdvanceMed a single opportunity to respond to the agency's OCI concerns, and "does not allude to a series of reengagements that last until a contractor finally stumbles across the correct measure." C2C Protest at 6. In support of their position, the protesters point to the use of the indefinite article "a" in FAR § 9.504(e) ("a reasonable opportunity"). C2C Protest at 6. In addition, C2C argues that, by its terms, FAR § 9.504(e) does not apply because it only speaks to providing the "apparent" awardee with an opportunity to address the agency's OCI concerns, and AdvanceMed is an "actual" awardee at this juncture.

In our view, CMS is not precluded from reengaging AdvanceMed regarding its OCI mitigation plan based on the use of the indefinite article "a" in FAR § 9.504(e). FAR § 9.504(e) merely establishes an agency's minimum duty to provide an offeror with an opportunity to respond to an agency's OCI concerns where, but for the OCI concerns, the offeror would receive an award. There is no indication in the language of the provision that, by establishing this minimum duty, FAR § 9.504(e) otherwise limits an agency's reasonable exercise of its discretion to provide an offeror with additional opportunities to address the agency's OCI concerns.

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<sup>4</sup> In any event, we conclude that the protesters advance an unreasonably narrow interpretation of our recommendation and that the agency's corrective action is not inconsistent with our decision. According to C2C and TrustSolutions, in determining whether AdvanceMed's proposal is acceptable, CMS is limited to considering AdvanceMed's OCI mitigation plan without any further revision. While it would have been permissible for the agency to have limited its reevaluation in this manner, there is nothing in our decision which expressly precluded CMS from taking broader action. In this regard, CMS's decision to instead obtain further information from AdvanceMed regarding its OCI mitigation plan is entirely consistent with—and in fact addresses the fundamental concern underlying—our decision, namely, that AdvanceMed's plan lacked sufficient detail for it to have been reasonably considered, and accepted, by CMS.

We also find unpersuasive C2C's argument that CMS is precluded from reengaging AdvanceMed regarding its OCI mitigation plan because AdvanceMed is the actual contract awardee and no longer the "apparent" awardee, as contemplated by FAR § 9.504(e). The reference in FAR § 9.504(e) to the "apparent successful awardee" clearly reflects the fact that the provision is intended to inform agencies of their duties before awarding a contract—it was obviously not drafted with post-bid protest corrective action in mind. There is nothing in FAR § 9.504(e) to suggest that an offeror's status as either the apparent or actual awardee has any bearing on how the agency should engage the offeror regarding its OCI mitigation strategy. In any event, in this case, because CMS's award decision is now in flux as a consequence of its decision to take corrective action, AdvanceMed is in essentially the same position as that of an "apparent" awardee. In sum, we see no basis to conclude that the agency's proposed corrective action is precluded by FAR § 9.504(e).

C2C and TrustSolutions further argue that reengaging AdvanceMed would constitute discussions with AdvanceMed and the agency is therefore required to reopen discussions with all offerors. We expressly rejected this argument in Cahaba Safeguard Adm'rs, LLC, B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39 at 10.<sup>5</sup> In Cahaba, we held that where an agency, pursuant to FAR § 9.504(e), conducts exchanges with an offeror regarding the offeror's plan to mitigate identified conflicts of interest, such exchanges do not constitute discussions and, as a consequence, they do not trigger the requirement to hold discussions with other offerors.

As a final matter, we dismiss the protesters' challenge to CMS's corrective action based on CMS's failure to fully implement our recommendation within 60 days of receiving our decision on the prior protest. Where our Office issues a bid protest decision with a recommendation for agency corrective action, the Competition in Contracting Act (CICA), 31 U.S.C. § 3554(b)(3), requires that the agency inform our Office if it fails to fully implement our recommendation within 60 days after receiving our decision.<sup>6</sup> The statutory provision at issue, 31 U.S.C. § 3554(b)(3), only

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<sup>5</sup> Cahaba and C2C Solutions, Inc., *supra*, were related cases in that both concerned CMS's consideration of the identical OCI mitigation strategy submitted by AdvanceMed.

<sup>6</sup> 31 U.S.C. § 3554(b)(3) provides as follows:

If the Federal agency fails to implement fully the recommendations of the Comptroller General under this subsection with respect to a solicitation for a contract or an award or proposed award of a contract within 60 days after receiving the recommendations, the head of the procuring activity responsible for that contract shall report such failure to the Comptroller General not later than 5 days after the end of such 60-day period.

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establishes an agency reporting requirement, which is procedural in nature and has no bearing on the propriety of the corrective action itself. Accordingly, a protest alleging that an agency has failed to comply with that provision does not state a valid basis for protest. Cf. Healthcare Tech. Solutions Int'l, B-299781, July 19, 2007, 2007 CPD ¶ 132 at 5 (explaining that we will not consider a protest challenging the adequacy of an agency debriefing because the adequacy and conduct of a debriefing is a procedural matter that does not involve the validity of an award).

In any event, as we explained in Consulting and Program Mgmt. Servs., Inc.--Recon., B-225369.2, July 15, 1987, 87-2 CPD ¶ 45, we do not interpret CICA as requiring full implementation of our recommendations within 60 days under all circumstances. Rather, we recognize that implementation within that period may not be practicable and we therefore read the provision at issue as requiring agencies to exert their best efforts to implement our recommendations within 60 days, and to notify our Office within 60 days if full implementation is not possible within that period. CMS has fully complied with its notification obligations, and while CMS has not fully implemented its corrective action within 60 days, we have no basis to conclude that CMS's proposed corrective action has been unduly delayed at this juncture or is otherwise improper.

The protests are denied.

Lynn H. Gibson  
Acting General Counsel

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The protesters argue that CMS has failed to fully implement our recommendation within 60 days since the notice CMS provided to our Office (on the 60<sup>th</sup> day after issuance of our decision) merely indicates that CMS is planning to reengage AdvanceMed regarding its OCI mitigation plan.